1992

# Arvilla Finlayson v. Roger Finlayson : Reply Brief

Utah Court of Appeals


William R. Russell, ESQ; attorney for defendant.
Sharon A. Donovan, ESQ, Kent M. Kasting, ESQ, Shannon W. Clark, ESQ; Dart, Adamson & Donovan; attorneys for appellant.

IN THE COURT OF APPEALS OF THE STATE OF UTAH

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| ARVILLA FINLAYSON, | : | |
| | : | |
| Plaintiff/Appellant, Cross-Appellee, | : | Case No. 920411-CA |
| | : | |
| | : | Priority No. 16 |
| v. | : | |
| | : | District Court 904905062DA |
| ROGER FINLAYSON, | : | |
| | : | |
| Defendant/Appellee, Cross-Appellant. | : | |

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# REPLY BRIEF OF APPELLANT

AN APPEAL FROM A JUDGMENT AND DECREE OF DIVORCE OF THE THIRD JUDICIAL DISTRICT, SALT LAKE COUNTY, UTAH, THE HONORABLE SENIOR JUDGE JOHN F. WAHLQUIST, PRESIDING

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## TABLE OF AUTHORITIES

## CONSTITUTIONAL PROVISIONS

There are no constitutional provisions, statutes, ordinances rules, or regulations whose interpretation is determinative to the disposition of the issues of this case other than §78-12-23 Utah Code Ann. (1953 as amended) (6 year statues of limitation on instrument in writing) and §30-3-3 Utah Code Ann. (1953 as amended) (award of attorney's fees in divorce actions).

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**REPLY BRIEF OF APPELLANT**

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## SUPPLEMENTAL STATEMENT OF FACTS

Arvilla wishes to correct an error made in her Statement of Facts, page 10, and in Point II of her Brief, page 26. Arvilla was incorrect in asserting that Roger was his mother's sole surviving child. Rather, Mrs. Mina Finlayson, testified she had three children, two of whom were still alive, Roger and Marilyn. (R-556) At the time Arvilla's Brief was written, her appellate counsel thought she had only had two children, Roger and Roland.

Roger's Statement of Facts attempts to establish that Arvilla had substantial knowledge about the 2 "notes" however the testimony of Roger and his mother show that not to be the case. Mrs. Finlayson said that the Hallmark "loan" was not any of Arvilla's affair (R-541) and that the loan was between her son and her only. (R-558) Roger said Arvilla really never knew what was owed to his

mother and that it was none of her business. (R-698) Arvilla had no knowledge of the rent "note" and in fact thought any sums advanced to be a gift (R-493) consistent with the monies given Roger's brother Roland. (R-521-22)

## ARGUMENT

### POINT I

THE TRIAL COURT WAS CORRECT IN THE WAY IT DEALT WITH THE "RENT NOTE" AND INCORRECT IN THE WAY IT DEALT WITH THE "HALLMARK NOTE"

Both Roger and Arvilla agree that the trial court erred in the inconsistent way it dealt with the two "notes" in question.

The thrust of Roger's argument is that the trial court had the equitable power to include both notes as marital obligations and in failing to include the rent "note," it abused its discretion. Arvilla, on the other hand, argues that the trial court did not have the power to include either "note" and in so including the Hallmark "note" it not only abused its discretion but also committed errors in law.

Three separate and distinct errors were committed by the trial court in its handling the "Hallmark Note." First, it determined that the debt was marital even though it was incurred by Roger, 2 years before the marriage, without any involvement of Arvilla. In addition, everyone admitted that Arvilla knew little if anything about the alleged loan. Roger and his mother said it was none of her affair. (R-541, 558, 698) The note which "surfaced" after 18 years was totally silent about the amounts allegedly advanced.

Conveniently, at the time of trial, what Roger said was an initial $14,800.00 loan had grown to $40,553.74. In spite of these undisputed facts, the trial court found this to be a marital debt on which both parties were obligated. This was highly inequitable to Arvilla and an abuse of discretion by the trial court.

Second, the trial court then imposed liability for one half of that debt on Arvilla without allowing her the right to defend on the merits of the claim. In effect, a separate civil action was allowed to be litigated and resolved in the divorce action to which Roger's mother was not even a party. To allow the divorce action to be a vehicle for Roger's mother to secure a judgment against Arvilla was clearly an error in law.

Third, assuming for the sake of argument only, that this debt was a valid debt, the trial court not only affirmed the debt but ruled that the parties' marital residence and cash was security for the debt and required that the debt be paid from those sources. It did this even though no security agreement ever existed. This amounted to converting an unsecured debt into a secured debt which would be paid without Roger's mother ever having to file a lawsuit. Simply put, the trial court collected a debt for Roger's mother using marital assets, without giving Arvilla an opportunity to defend on the merits.

For Roger to argue that this transaction should not be subject to the same scrutiny as a commercial transaction because it is a "family" transaction is simply specious. If Arvilla is to be

charged with responsibility for one-half of a $40,000.00 obligation, she is entitled to all protections afforded any debtor from whom a creditor seeks recovery.

The flaw in Roger's argument that equity allows a divorce court to do this is that equitable considerations are applicable only as to the husband and wife involved in the action. Principles of equity in divorce cases do not extend to third party creditors such as Roger's mother was made out to be.

The trial court was correct in concluding that the rent note should not be considered a marital obligation. It was incorrect in concluding the "Hallmark note" was a marital obligation. In the case of either, Roger's mother can seek to recover what she thinks is due her by filing her own independent action and Roger and Arvilla can respond and raise such defenses as he or she may see fit.

In summary, a divorce court is not a proper forum to allow a third person, not a party to the action, to secure a judgment and collect amounts the third person feels the divorce litigants may owe him or her.

On page 23 of Roger's Brief, he states:

> In short, there appears no substantial reason to treat the "Hallmark Note" and "Rent Note" in a different manner as equity requires consistency of treatment. Id.

Arvilla agrees totally with this statement and asks this Court to reverse the trial court's decision related to the Hallmark "Note."

## POINT II

THE EVIDENCE WAS INSUFFICIENT TO SUPPORT THE TRIAL COURT'S FINDINGS RELATED TO THE VACANT LOT IN SPITE OF ROGER'S ARGUMENTS TO THE CONTRARY.

Contrary to Roger's argument in Point II of his Brief, Arvilla did set forth in her brief all of the evidence in support of the trial court's finding that the vacant lot adjacent to the marital residence was not marital property. The sum and substance of that evidence amounted to the testimony of three most interested and very aligned individuals; Roger, Roger's mother and Roger's son. Each testified that the lot was never intended to be given to Roger and Arvilla. Conspicuously absent from Roger's evidence on this issue is any documentary evidence or non-interested third party testimony in support of Roger's position that the lot was not marital property.

In accord with her responsibility on appeal, Arvilla did marshall all of the evidence in support of that finding. (See page 24, Arvilla's Brief) She then proceeded to set forth all of the evidence which was against such a finding and in favor of a finding that the lot was marital property. That evidence consisted of Arvilla's testimony, documentary evidence and undisputed facts related to the parties' control and maintenance of this property for over 13 years. (See pp 24-26 of Arvilla's principal Brief.)

When viewed and taken as a whole, the evidence clearly weighs in favor of a finding that the lot was marital property and should have not been excluded from the marital estate.

Parenthetically, the practical effect of the trial court's decision was to expand a regular divorce proceeding, involving only Roger and Arvilla, into a quiet title action involving Arvilla and Roger and Roger's mother. In so doing, it granted Roger's mother, a non-party to this action, relief which she could not have secured without being required to file her own action. In addition, the action of the trial court effectively precluded Arvilla from raising numerous defenses such as adverse possession, statute of limitations, estoppel, laches and waiver.

As with the Hallmark note issue, the trial court improperly merged separate independent actions into the divorce and granted Roger's mother, a non party, relief that could properly only be secured by her filing her own civil action against Roger and Arvilla to set aside the deed and quiet title in her name.

The evidence, when viewed objectively, is overwhelmingly in favor of a finding that the lot was marital property, having been properly conveyed to Roger and Arvilla 13 years before the trial of this divorce case. The lot should have been included as part of the marital estate.

## POINT III

ARVILLA IS ENTITLED TO BE REIMBURSED ALL OF THE ATTORNEY'S FEES SHE WAS REQUIRED TO INCUR BECAUSE OF ROGER'S RECALCITRANT BEHAVIOR.

Point III of Roger's Brief fails to address the basic question raised by Arvilla - Was she entitled to be awarded $2,599.15 in fees attributable to Roger's failure to cooperate during the divorce proceedings when there was no evidence offered to contradict the fact that those fees had been incurred and when Roger's recalcitrance had been noted by the trial court?

Roger does not deny his actions/inactions related to this recalcitrance as described on page 28 of Arvilla's Brief. In fact, he admits his failure to cooperate. (See page 16 of Roger's Brief.) The trial court acknowledged that the evidence was strong that he frequently did not carry out intentions. (R-293)

The trial court recognized the uncooperative attitude of Roger. The only evidence before the court as to the amount of fees Arvilla was required to incur as a result of that uncooperative attitude, was the unchallenged testimony of Ms. Donovan. Given this, the trial court was left with no other alternative than to award Arvilla the entire $2,599.15 in requested fees.

To arbitrarily give her only $500.00 of that sum in the face of that uncontradicted evidence is reversible error. Arvilla should receive an additional $2,099.15 in fees to reimburse her for the fees she would not have had to incur had Roger not acted in such a contrary way throughout these proceedings.

## POINT IV

THE TRIAL COURT ACTED IN AN ARBITRARY AND CAPRICIOUS MANNER AND COMMITTED ERRORS IN LAW IN THE WAY IT CONDUCTED THE TRIAL AND REACHED IT'S DECISION.

Point IV of Roger's Brief misses the point and thrust of Arvilla's claim that the trial judge acted in an arbitrary and capricious manner in its overall handling of the trial and rendering of its decision.

First, Arvilla wishes to reemphasize that she would request a new trial on all issues, only if this Court does not reverse the trial court's decision related to the "Hallmark note," the adjacent lot and the $500.00 award of attorney's fees. If this Court grants the relief requested in Points I, II and III, of her principal brief, that relief would be sufficient to allow her to withdraw her request for a new trial before a different Judge.

In order for Arvilla to prevail in an appeal, she must show that the trial court, in making it's distribution of property,

1) Misunderstood or misapplied the law;

2) Entered findings not supported by the evidence;

3) Caused a serious inequity; or

4) Acted arbitrarily and capriciously, so as to constitute an abuse of discretion. [See English v. English 565 P.2d, 409, 410 (Utah 1977).]

As demonstrated in Arvilla's principal brief and not adequately rebutted by Roger, the trial court,

1) Acted inconsistently in the way it handled the two "notes" and gave relief where it was not justified and imposed burdens on Arvilla which were not legally enforceable.

2) Entered findings related to the undeveloped lot which were clearly contrary to weight of the objective evidence presented.

3) Enforced an unenforceable obligation and excluded a significant asset from the marital estate, causing a serious inequity to Arvilla and in effect giving Roger the "lions share" of the marital estate.

4) Blatantly acted arbitrarily and capricious in the assigning of values to and distribution of the personal property of the parties improperly forcing the parties to settle that issue rather than entrusting their fate to the "flip of a coin."

The record, the statements of the trial judge from the bench and the statements in his Memorandum Decision demonstrate that he was inattentive and did not understand or properly apply the law to the facts presented to him. The arguments made in the Point IV of Arvilla's principal brief are well taken and have not been successfully rebutted by Roger by claiming that such a division was equitable and that the parties ultimately divided this property by stipulation.

## POINT V

THIS COURT MAY DISREGARD ANY OR ALL OF ROGER'S TESTIMONY BECAUSE HE TESTIFIED FALSELY ABOUT HIS EXHIBIT 18

In the course of briefing, Appellant's counsel has discovered a fact that calls into question the authenticity and validity of Roger's Exhibit 18, the Hallmark "note", (Page A-1 Addendum to this reply Brief) and the truthfulness of Roger's testimony about that Exhibit.

During trial, Roger produced two "notes" he claimed he prepared and signed and gave to his father on September 4, 1962, and September 4, 1964, respectively. (See Defendant's Exhibit's 18 and 19 included in the Addendum to Arvilla's principal Brief and the Addendum to this Reply Brief.) He testified he prepared and signed Exhibit 18 on September 4, 1962. (R-581, 582) He then testified he did not see either of these notes until shortly before the divorce was filed in December of 1990. (R-582) His mother's testimony was different. She said she found these papers about 18 years ago, 2 or 3 years after her husband's death, (R-561) and that she had given them to Roger several years ago. (R-561-562)

Arvilla, during the course of trial questioned the authenticity of the two "notes" but was not successful in convincing the trial court that these notes were prepared in anticipation of this litigation. (R-603) It has now become apparent to Arvilla's counsel that Defendant's Exhibit 18 is not authentic and had to have been prepared later in time and after the fact,

contrary to Roger's testimony. This is the only conclusion that can be reached because Exhibit 18, allegedly prepared by Roger on September 4, 1962, contains two addresses. Both addresses have Zip Codes of "84105."

This Court should take judicial notice of the fact that Zip Codes were not adopted and implemented by the Postal Service until July 1, 1963. (See page i of U.S. Postal Service 1992 Book of Zip Codes, included in the Addendum to this Reply Brief.)

The document itself reveals that Roger did not testify truthfully and as such this Court can disregard any or all of his testimony in resolving the issues raised in this appeal. [(See Gittens v. Lundberg, 3 Utah 2d 392, 284, P.2d 1115 (Utah 1955).]

Arvilla would respectfully request this Court to deny and dismiss Roger's cross appeal and grant Arvilla all of the relief she has requested.

## POINT VI

ARVILLA IS ENTITLED TO BE AWARDED HER ATTORNEY'S FEES AND COSTS RELATED TO THIS APPEAL.

In arguing that neither party should be awarded their attorney's fees and costs related to this appeal, Roger fails to demonstrate an understanding of the legal principles enunciated by this Court and the Utah Supreme Court in relation to awarding fees and costs in connection with the appeal of divorce cases.

First, Arvilla agrees that Roger is not entitled to an award of any fees and costs on appeal because he has not requested them and in fact has argued that each side should bear their own fees.

Second, it is a well established principle of Utah law that when a party to a divorce action is required to appeal a trial court's decision and successfully demonstrates that the trial court committed substantial and prejudicial error requiring reversal, that party is entitled to be reimbursed by the other party the fees incurred on the appeal. [See Bell v. Bell, 810 P.2d 489, 494 (Utah App. 1991); Crouse v. Crouse, 817 P.2d 836, 840 (Utah App. 1991).]

In this case, Arvilla has demonstrated that the trial court committed errors in law, made an unfair and inequitable distribution of marital assets and liabilities and acted in an arbitrary and capricious manner justifying a reversal of the trial court's decision. Having done so, she is entitled to be awarded her fees and costs related to this appeal.

## CONCLUSION

The responsibility of a trial court in divorce cases is to fashion a property and debt distribution which is fair to both parties. In this case, the trial court's decision cannot stand in that it is blatantly unfair to Arvilla, and not in accord with existing Utah law as it relates to equitable distribution of debt and property. Arvilla respectfully requests this Court to award her the relief requested on page 3 of her principal Brief; to deny

the relief requested by Roger in his cross appeal and to award her all of her fees and costs related to this appeal.

RESPECTFULLY SUBMITTED this 19 day of March, 1993.

DART, ADAMSON & DONOVAN

By _____
Kent M. Kasting of Counsel
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Shannon W. Clark
Attorneys for
Plaintiff/Appellant
Arvilla Finlayson

**CERTIFICATE OF DELIVERY**

I hereby certify that two true and correct copies of the above and forgoing REPLY BRIEF OF APPELLANT duly hand delivered to:

William R. Russell, Esq.
8 East Broadway, Suite 213
Salt Lake City, Utah 84111

DATED this 19 day of March, 1993.

_____
Kent M. Kasting of Counsel
Sharon A. Donovan
Shannon W. Clark
Attorneys for
Plaintiff/Appellant
Arvilla Finlayson

**ADDENDUM**

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Volume 1

# —1992—
# NATIONAL FIVE DIGIT ZIP CODE® & POST OFFICE DIRECTORY

xpires December 31, 1992



Directory is published by MB Ltd. Services, Inc., a company which holds a non-exclusive license from nited States Postal Service to publish and sell this National Five Digit ZIP Code® and Post Office Directory td. Services, Inc , is located at 10014 Dallas Avenue, Silver Spring, Maryland 20901. Questions concerning irectory can be answered by calling (301) 565-2539. You may call Monday through Friday, except Federal ıys, between the hours of 9:00 a.m. through 5:00 p.m. Eastern Standard Time.

# INTRODUCTION

The U.S. Postal Service publishes the *National Five-Digit* ZIP *Code and Post Office Directory* annually to furnish customers and U.S. Postal Service personnel correct and current five-digit ZIP Code and mailing information.

This directory contains complete information relating to the five-digit ZIP Code system and information required by the mailer concerning U.S. Postal Service facilities and organization.

The five-digit ZIP (Zone Improvement Plan) Code was introduced to the public July 1, 1963 and was viewed as a positive step for improving the productivity of mail distribution during a period of escalating mail volume and expanding delivery stops. Additionally, five-digit ZIP Code areas lend themselves to a broad variety of other applications, including geographic and demographic utilization.

Currently, 98% of all First-Class Mail bears a ZIP Code. ZIP Codes support the distribution of letters and other types of mail to 40,000 post offices, stations, and branches serving approximately 117 million homes, farms, and businesses across the nation.

It is extremely important that all mailers obtain a current edition of this publication in order to have the accurate five-digit ZIP Code information for any address in the nation.

Five-digit ZIP Code information may also be obtained by calling the main post office in your local area.

# HOW TO FIND A FIVE-DIGIT ZIP CODE® IN THIS DIRECTORY

The following instructions and sample page layout (p. 3-2) will help you find the correct five-digit ZIP Code for mailing addresses.

FOR MOST POST OFFICES

1. *TURN* to Section 3, *STATE LIST OF POST OFFICES AND POST OFFICES WITH STREET LISTINGS*, and find the state in alphabetical order.
2. *FIND* the post office in alphabetical order within the state.
3. If a post office has more than one five-digit ZIP Code, you will find A "SEE PAGE" reference followed by a page number. These post offices' listings are in the following order:
   - A. Post office boxes at main offices, stations, and branches
   - B. Rural routes and/or highway contracts
   - C. Postmaster and general delivery
   - D. Apartments, hotels, buildings, governmental offices, etc.
   - E. Named streets*
   - F. Numbered streets*
4. *FIND* the entry of the address for which you need a five-digit ZIP Code.
5. *COPY* the five-digit ZIP Code that appears beside the entry.

For more detailed information on symbols and definitions, refer to section 3, *STATE LIST OF POST OFFICES AND POST OFFICES WITH STREET LISTINGS.*

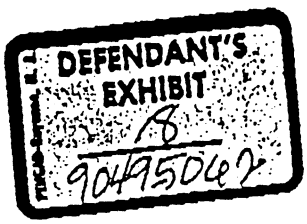
*Some streets have only one entry, indicating that all addresses on the street have the same ZIP Code. Other streets have two or more entries, each followed by the range of house numbers included by a given ZIP Code. In some instances, the final entry for a street has a house number, followed by the word "out." This means that the number shown and all higher numbers for that street have the indicated ZIP Code.

# Utah Oil Refining Company

UTAH OIL BUILDING

Salt Lake City 10, Utah

GLEN A. FINLAYSON
Architectural Engineer




Roger W Finlayson
975 Diestel Road
Salt Lake City, Utah 84105

Sept. 1, 1962

To

Glen A. Finlayson and or Mina W Finlayson
973 Diestel Road
Salt Lake City, Utah 84105

I Roger W Finlayson promise to pay upon demand all monies borrowed, plus 6% interest per year, on each year on the monies borrowed until all monies borrowed and interest are repaid.

If in the event the store is not a success the first monies received from the sale of the store and contents will be reserved for the payment of indebtedness to Glen A. Finlayson and or Mina W Finlayson.

Roger W Finlayson

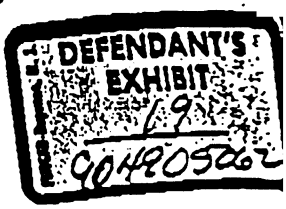
Dep 3

# Utah Oil Refining Company

UTAH OIL BUILDING

Salt Lake City 10, Utah

GLEN A. FINLAYSON
Architectural Engineer




Sept. 6, 1964

I Roger W Finlayson promise to pay Glen A. Finlayson or Mina W. Finlayson $190.00 (one hundred ninety dollars) per month for rent of a duplex at 975 Diestel Road., S.L.C., Ut. for the amount of time Roger W Finlayson and Arvilla Finlayson live at said address. I forther promise to pay 6% interest per year for each and every year, or part there of, that we live there or until all indebtedness is paid in full.

Roger W Finlayson

Lep 3

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